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Supreme Court, U.S.
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No. 97-982

In The

Supreme Court of the United States

October Term, 1997

GERALD GARNER and JOAN GARNER,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES TO THE PROCEEDING AND LIST OF ALL PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

The list required by this Rule has already been provided in the Petition for Writ of Certiorari, filed on or about December 10, 1997.

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Gerald Garner and Joan Garner hereby submit this brief in reply to the "Brief for the Respondent in Opposition" ("Opposition") filed by the Federal Deposit Insurance Corporation ("FDIC").

This case alleges purported negligence, not intentional wrongdoing, by former directors and one officer of a seized bank. No allegations of fraud or fraudulent conveyances are made in the Complaint. No allegations are made of embezzlement or conversion of bank assets. No criminal proceeding has been initiated. No bank assets are alleged to be missing. All of the transactions on which the FDIC is suing were amply documented in the bank's records.

The FDIC states, "Because this case is the first one before any court of appeals in which the FDIC has invoked the asset freeze provisions to prevent dissipation of assets by persons charged with benefiting from wrongdoing other than fraud, its holding is not in conflict with the decision of any other court of appeals, and no further review is warranted." (Opposition, p. 7.) Putting aside the fact that this rationale in and of itself would be a reason to grant certiorari under Sup. Ct. R. 10(c), because it involves an important question of federal law which should be settled by this Court, the FDIC is simply wrong in its reasoning. Notably, also, the FDIC has now changed its argument 180 degrees from its original briefs on this matter submitted to the trial court. As set forth in detail in petitioners' opening brief, the decision of the court of appeals is squarely in conflict with all of the other courts

which have considered the issue of whether 12 U.S.C. § 1821(d), subsection (18) and (19) ("Sections 18 and 19"), can be invoked in the absence of allegations of fraud, fraudulent conveyances, or criminal conduct. To ensure uniformity among the lower courts, and to stop outrageous abusiveness by a government agency, this Court should grant certiorari.

Like the instant case, *FDIC v. Floyd*, 827 F. Supp. 409, 412-414 (N.D. Tex. 1993) ("*Floyd*") involved "the dissipation of assets by persons charged with benefiting from wrongdoing other than fraud." In that case, the FDIC sought a preliminary injunction to freeze the defendant's assets for the purpose of collecting on a promissory note. The defendant had shipped his assets abroad to Lichtenstein, presumably for the express purpose of avoiding seizure; a clearer case of dissipation of assets could hardly be imagined. Moreover, there were allegations of criminal conduct, as the defendant was already a party to a criminal proceeding. Nevertheless, the *Floyd* court refused to allow the assets to be seized under Sections 18 and 19, finding that in all cases in which Sections 18 and 19 had been invoked, "the underlying suit involved, at least in part, allegations of fraud," (827 F. Supp. at 412.) The court stated, in pertinent part:

> In this suit, the FDIC argues that to restrain Floyd's funds it must show only
>
> (1) a substantial likelihood of recovery on the promissory note; (2) the equities weigh in its favor; and (3) that the public interest would not be disserved by issuance of a preliminary injunction. If such were the case, the FDIC would be required to show neither irreparable

> harm nor fraudulent conduct to obtain a preliminary injunction in a simple action for damages at law. The Court cannot agree with such a premise.

827 F. Supp. at 412-413. The *Floyd* court concluded that a petition for a preliminary injunction brought under Sections 18 and 19 "must include a showing of fraudulent conduct. Otherwise, the statute operates to afford Draconian relief to the FDIC under everyday circumstances." 827 F. Supp. at 414.

The *Floyd* court expressly relied on two decisions of two different courts of appeals: *FDIC v. Faulkner,* 991 F.2d 262 (5th Cir. 1993) ("*Faulkner*") and *Resolution Trust Corporation v. Cruce,* 972 F.2d 1195 (10th Cir. 1992) ("*Cruce*"). In its August 15, 1996 order, the trial court had correctly interpreted these cases as linking relief under Sections 18 and 19 to the presence of a fraudulent conveyance claim under 12 U.S.C. § 1821(d)(17) ("Section 17"). (Exc. 50, CR 50, p. 4.)

A year after *Floyd* and *Faulkner* were decided, a third court of appeals decided in *FDIC v. Elio,* 39 F.3d 1239 (1st Cir. 1994) that the validity of the preliminary injunction granting an attachment in that case and appointing a trustee was "by no means separable from the merits of the FDIC's fraudulent conveyance claims." 39 F.3d at 1249.

At the hearing on the preliminary injunction in this case, both the trial court and the FDIC conceded that *Floyd* was "on all fours" with the instant case. (R.T., Exc. H, p. 6, lines 24-25.) Another case which is equally "on all

fours" is *Resolution Trust Corporation v. Gershman*, 829 F. Supp. 1095 (E.D. Mo. 1993). In that case, as in the instant case, the plaintiff as receiver for a seized financial institution sued former directors and officers of the institution for negligence, gross negligence, and breach of fiduciary duty – but not fraud or conduct amounting to fraud – and sought an accounting of all transfers of interests in property made by the defendants, all assets held by the defendants, and all liabilities incurred by the defendants in the five years prior to the appointment of the receiver. The plaintiff further requested, pursuant to Sections 18 and 19, that the court set aside any transfers made and liabilities incurred with the intent to hinder, delay or defraud the institution. In effect, the plaintiff sought to freeze any assets which could be used to satisfy a judgment, as in the instant case.

The *Gershman* court stated, in pertinent part:

> Courts have ordered equitable relief pursuant to 12 U.S.C. § 1821(d)(18) where there was a substantial likelihood that the moving party could prove that the defendant had made fraudulent transfers, *Federal Deposit Insurance Corp. v. Cafritz*, 762 F. Supp. 1503, 1508 (D.D.C. 1991), or where the defendant was liable for an admitted debt. *Federal Deposit Insurance Corp. v. Owen*, No. 5:91CV00389, U.S. Dist. LEXIS 12145 (D. Conn. April 27, 1992) . . .
>
> In the instant case, Plaintiff does not allege that Defendants made fraudulent transfers, that they defaulted on loan obligations to [the institution] or that they took excessive salary or bonuses or in any way benefited economically from their alleged negligence, gross negligence

> or breach of fiduciary duty. Plaintiff does not cite any authority for the proposition that § 1821(d)(18) authorizes the Court to require an accounting or to impose an asset freeze in the absence of such allegations. Nor does the Court's independent research uncover any such authority. Accordingly, the Court will dismiss . . . for failure to state a claim.

829 F. Supp. at 1102-1103.

The FDIC attempts to distinguish *Gershman* by claiming that in that case "the RTC did not allege that the defendant [sic] benefited in any way from the alleged wrongdoing." (Opposition, p. 7, fn. 2.) However, the two cases cannot be distinguished. The vast bulk of the approximately $14 million in damages being sought by the FDIC relates to loans made by the seized bank to third parties wholly unrelated to any defendant. Defendants are being sued as members of the directors' loan committee for alleged negligence in having approved the decisions made by bank officers (none of whom have been sued) to grant these loans, not for having profited from them. Moreover, while there are some allegations of loans having been made to defendants or allegedly related entities, most of these transactions have also been the subject of separate civil proceedings, which were finally settled after the FDIC initially refused to accept payment. In short, most of the alleged damages still asserted in this lawsuit have nothing to do with allegations of any personal profit or benefit on the part of defendants. Thus, *Gershman*, like *Floyd*, is directly on point and holds that Section 18 would not authorize an asset freeze in such situations.

See also National Credit Union Administration Board v. Concord Limousine, Inc., 872 F. Supp. 1174 (E.D.N.Y. 1995), in which the district court relied on *Floyd, supra*, in denying a motion for a preliminary injunction to prevent the defendants, who were guarantors of an obligation owing to the plaintiff, from dissipating their assets pending suit.

Based upon the overwhelming weight of authority, the district court twice refused to grant the requested injunction, but then changed its mind suddenly on the third application even though no new facts or cases had been cited to the court.

In summary, numerous cases in circuits other than the Ninth Circuit have addressed the issue of whether Sections 18 and 19 authorize the entry of a preliminary injunction freezing a defendant's assets absent a showing of fraudulent conduct, fraudulent conveyances, or criminal conduct. Uniformly such cases have held that fraudulent or criminal conduct is required before an injunction may issue pursuant to those statutes. To petitioners' knowledge, the instant case is the first case which has held that such conduct is not required. Accordingly, there is a direct conflict in the cases and among the circuits on this issue. If the Court does not grant this Petition, petitioners respectfully contend that this conflict will remain unresolved and that the ruling of the Ninth Circuit will render the law muddy and confused on this issue of crucial importance to the banking community.

Moreover, substantial policy reasons exist for granting the Petition. Prior to the decision of the court of appeals in this case ("the appellate decision"), the law was clear that an injunction could not be granted under

Sections 18 and 19 unless the case involved allegations of intentional wrongful conduct extending well beyond mere negligence or the failure to repay a loan. However, the appellate decision, relying on the purported "plain words" of the statutes, would now permit the FDIC to apply for and receive an injunction freezing all of the assets of a defendant pending trial in virtually any case, even a mere collection case.[1] This effectively eliminates any requirement of intentional wrongful conduct on the part of a defendant before such an injunction may be granted, and all of the debate contained in the cases cited above and in petitioners' opening brief will be rendered moot. The statutes contain no due process or fairness constraints. As the *Floyd* court feared, absent a showing of fraudulent conduct, "the statute operates to afford Draconian relief to the FDIC under everyday circumstances." 827 F. Supp. at 414. This case is truly an example of such "Draconian relief" and demonstrates that the *Floyd* court's fear was well-founded.

For all of the reasons set forth above and in the Petition, petitioners request that the Petition be granted.

Respectfully submitted,

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[1] To the extent that the instant case seeks merely to recover loans allegedly owed to the bank by defendants/petitioners, that is indeed what this case is – a mere collection case.